UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION TWENTY-FIVE

Indianapolis, IN

POLAR REFRIGERATION, HEATING AND COOLING, INC. and POLAR DISTRIBUTORS, INC.[1]

and Case 25-RC-10170

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL UNION NO. 20, a/w SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, AFL-CIO[2]

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held March 13, 2003, before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board, to determine an appropriate unit for collective bargaining.[3]

I. ISSUES

Sheet Metal Workers' International Association, Local Union No. 20, a/w Sheet Metal Workers' International Association, AFL-CIO, (herein called the Petitioner), seeks an election

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[1] The name of the Employer appears as stated in the Questionnaire on Commerce Information entered into evidence at hearing as Board's Exhibit 2.

[2] The name of the Petitioner has been corrected to reflect its full legal name.

[3] Upon the entire record in this proceeding, the undersigned finds:
a. The hearing officer's rulings made at the hearing are free from error and are hereby affirmed.
b. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
c. The labor organization involved claims to represent certain employees of the Employer.
d. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

within a unit comprised of all full-time service technicians and service technician helpers who are employed by Polar Refrigeration, Heating and Cooling, Inc., (herein called Polar Refrigeration), and by Polar Distributors, Inc., (herein called Polar Distributors), at their facility located in 815 South Halleck, Demotte, Indiana. On February 27, 2003, Polar Refrigeration and Polar Distributors were served by United States mail with a copy of the instant petition and a notice of hearing which indicated that a hearing on the petition would be conducted on March 13, 2003. Prior to the hearing the President of Polar Refrigeration and Polar Distributors, through his designated counsel, filed two letters with the Board, one of which included a completed Questionnaire on Commerce Information. Despite the foregoing, neither the President of the companies nor anyone acting on their behalf appeared at the hearing. Nonetheless, a hearing was conducted in this matter during which evidence was received regarding the effect of the companies' business upon interstate commerce; the status of the Petitioner as a labor organization; evidence regarding the single employer status of the Employers;[4] and evidence regarding the appropriateness of the petitioned ;unit.

II. DECISION

For the reasons discussed in detail below, it is concluded that the Board has jurisdiction over Polar Refrigeration and Polar Distributors, and that these Employers constitute a single employer for purposes of the Act. In addition, it is concluded that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act. It is also concluded that the petitioned unit of employees constitutes a unit appropriate for purposes of collective bargaining.

The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time service technicians and service technician helpers[5] employed by the Employer at its Demotte, Indiana facility; BUT EXCLUDING all professional employees, office clerical employees, guards and supervisors as defined in the Act, and all other employees.

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[4] In light of the finding herein that Polar Refrigeration and Polar Distributors constitute a single integrated enterprise, they are hereinafter jointly referred to as "the Employer."

[5] The petition seeks only full-time employees; however, since the record indicates that the incumbent technician helper works on a part-time basis approximately 35 hours per week during the school year, and on a full-time basis during summer months, it is appropriate to include regular part-time employees in the unit. Students are appropriately included within a bargaining unit if they work on a regular basis and otherwise share a community of interest with unit members, St. Clare's Hospital, 229 NLRB 1000 (1977). As will be discussed in greater detail herein, the current part-time employee works on a weekly basis and shares a community of interest with other unit members.

The unit found appropriate herein consists of approximately three employees for whom no history of collective bargaining exists.

III. STATEMENT OF FACTS

A. The Business Operations of Polar Refrigeration and Polar Distributors

Polar Refrigeration is engaged in the installation and service of commercial and residential heating and air conditioning systems (HVAC), as well as the sale, lease, and service of refrigeration equipment such as ice machines, coolers, and freezers. Approximately 80% to 90% of its HVAC business is commercial, while 10% to 20% is residential. Polar Distributors leases, installs and services machines used to produce "Smoothie" and “Slushie” beverages. Both businesses operate out of an office located at 815 South Halleck, Demotte, Indiana, and share a repair shop located at 8871 West 1300 North, Demotte, Indiana.

The sole owner of both businesses is Tim Birkett, who also supervises the day-to-day operations of the businesses. Birkett is the only supervisor of approximately five individuals employed by Polar Refrigeration/ Polar Distributors: two full-time service technicians, one service technician helper, and two secretaries. The two service technicians work 40 hours per week except during the summer months, when they may work as much as 60 or 70 hours a week. The service technician helper works 35 hours a week during the school year, but may also work 60 to 70 hours a week during the summer months. The summer months extend from approximately May to October. One of the service technicians works from 8:00 AM to 4:00 PM during the week, while the other one works from 9:00 AM to 5:00 PM. They alternate these schedules every other week. The helper works from 8:00 AM to 5:00 PM Tuesday through Friday.[6]

One of the service technicians earns $14.00 an hour, and the other one earns $11.50 an hour. The service technician helper earns $7.50 an hour. All three wear uniforms that consist of a shirt bearing their names and the name of Polar Refrigeration. They wear it with jeans and steel-toed boots. They wear this uniform both when they are performing work for Polar Refrigeration and Polar Distributors. All three employees also receive company-provided health insurance for which they pay $10 a week, while the Company pays another $10 a week toward their coverage.

The service technicians and helper report to work each day at the repair shop. They sign in and out their work hours on a clipboard hung at the shop. They receive their work orders for the day from Birkett. On any given day they may perform work for either or both Polar Refrigeration and Polar Distributors. The employees’ duties include installing furnaces and air conditioning systems in commercial and residential buildings; installing and servicing ice

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[6] Testimony does not identify the helper's current course of study, but indicates that he attends school on Mondays, and has made arrangements with the Company to work the remainder of the week, averaging approximately 35 hours per week.

machines that are usually leased to customers; and installing and servicing other types of refrigeration equipment. The work they perform for Polar Distributors consists of installing and servicing drink machines leased by customers. These machines produce "Smoothie" and "Slushie" drinks. The employees also perform work at the repair shop servicing various equipment for customers. During the summer months the employees spend approximately 90% to 95% of their time in the field, and the rest of their time in the shop. When the employees are visiting customers they drive company-owned trucks that bear the Polar Refrigeration name. There are four trucks and they use these same trucks when performing work for Polar Refrigeration and Polar Distributors. The employees do not drive the trucks home, and report to the shop at the end of each day.

The service technicians and helper have daily contact. The helper works with one of the two technicians approximately 95% of his time. He services ice machines, delivers drink machines, and performs most of the same type of tasks as the technicians except that he does not handle refrigerant because he is not EPA certified to do so. The helper receives on-the-job instruction while working with the technicians.

B. The Employer's Relationship to Interstate Commerce

Leasing ice machines to commercial customers comprises a major segment of Polar Refrigeration's business.[7] These ice machines (or icemakers) dispense ice and have a bin into which the ice falls, from which customers retrieve the ice. Under these lease agreements customers pay a monthly fee between $69 and $120 depending on the size of the machine. This monthly fee covers the lease of the machine, and any parts and labor needed. There are approximately 150 to 200 customers who currently lease at least one ice machine, and three to four new customers are generally acquired each month.. The ice machines cost the Employer between $1,200 and $1,800 each, and are usually purchased from one of three sources: Hoshizaki, located in Georgia; Manitowoc located in Wisconsin; and Scottsman with locations in Illinois and either North or South Carolina.

At least one service technician travels to Illinois at least once a week to service ice machines and other equipment leased from the Employer by customers. A technician testified that during the last year he serviced customers located in Illinois on 30 to 50 occasions. In Illinois there are about 20 customers who lease ice machines**.** There is also one customer located in Illinois who does not lease equipment from the Employer, but whose equipment the Employer services, including walk-in coolers and freezers. During the last year the Employer has serviced this customer at least six times. Within the week preceding the hearing, this client was billed a total of approximately $250 for service, and this reflects a typical bill.[8]

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[7] The description of the Employer's business discussed herein is based upon the testimony of one service technician and the technician helper.

[8] This customer is billed $50 an hour for labor, plus a service call fee of $28.50, a truck mileage fee of $28, and the cost of parts.

Another part of the Employer's business consists of the sale and lease of walk-in coolers and smaller "reach-in" coolers. Polar Refrigeration has purchased at least two walk-in coolers in the last 12 months from a company located in Alabama. It also purchased five to ten smaller reach-in coolers during the past year. These coolers are manufactured in Missouri and are sold to customers for $1,200 and $1,800. At least three such coolers were sold during the past year, and at least two were leased. The record does not reflect the lease value of the coolers.

Polar Refrigeration also purchased other types of equipment, such as furnaces and air conditioners. During the last year, the company purchased 10 to 15 furnaces at a cost between $700 and $1,000 each, and approximately ten air-conditioners at an approximate cost of $500 each. The location of the manufacturers of these items is not known, however.

Polar Refrigeration also purchases a number of service parts each year, such as compressors, fan motors, thermostats, refrigerants, and electrical components. These parts are purchased from a local distributor, and the states of origin of the parts are not known.

Polar Distributors leases the Smoothie/ Slushies drink machines to restaurants, bars and gas stations, including at least one customer located in Illinois. During the past year the company purchased 9 to 10 drink machines for lease, but the record does not indicate the cost of the machines nor their state of manufacture.

C. Labor Organization Status

The Petitioner is an organization with a principal office in Indianapolis and several satellite offices throughout the state of Indiana. It is affiliated with the Sheet Metal Workers' International Association, AFL-CIO. It negotiates collective bargaining agreements with employers in the building trades and manufacturing industries. These collective bargaining agreements address employee wages, benefits, working conditions, and hours of employment,, among other subjects. The Petitioner represents employees and adjusts grievances pursuant to these collective bargaining agreements. Currently, approximately 22 manufacturing companies are signatory to contracts with the Petitioner, and over 100 employers in the building trades industry. The Petitioner also engages in organizing non-union employees and employers. It currently has over 5,000 members. The Petitioner is governed by bylaws and a constitution, and conducts monthly membership meetings at its satellite offices, and statewide meetings every other month. Officers of the Petitioner are elected by members through statewide elections

IV. DISCUSSION

A. The Jurisdictional Issue

Under the Board's Tropicana rule, the Board will assert jurisdiction over an employer who has refused to provide information to enable the Board to determine whether the employer meets the Board's jurisdictional standards, if the record at a hearing establishes that the Board has statutory jurisdiction, Tropicana Products, 122 NLRB 121 (1958). This rule was fashioned to advance the policies underlying the Act and promote the prompt resolution of cases. The Act

extends jurisdiction to all cases involving enterprises whose operations affect interstate commerce. The Board's jurisdiction has been construed to extend to all such conduct as might constitutionally be regulated under the commerce clause, subject only to the rule of *de minimis*. NLRB v. Fainblatt, 306 U.S. 601, 606 (1939). This rule provides that the Board will assert jurisdiction over an employer whose impact upon interstate commerce is more than "*de minimus*." The Board has held that revenues as little as $1,500 derived from interstate commerce are a sufficient basis for the Board's assertion of statutory jurisdiction, Marty Levitt, 171 NLRB 739 (1968); Pet Inn's Grooming Shoppe, 220 NLRB 828 (1975).

Prior to the hearing herein, the Employer completed a commerce questionnaire provided it by the Region, in which the Employer indicated revenues insufficient to meet the Board's discretionary jurisdictional standards. Therefore, a hearing was necessary to assess with exactitude the impact of the Employer' operations upon interstate commerce. The Employer was provided sufficient notice of the date of the hearing to enable it to attend, and prior to the hearing the Employer acknowledged its receipt of this notice.[9] At no time has the Employer asserted that its attendance at hearing was precluded by circumstances beyond its control. As in Tropicana, the Employer here failed to appear at hearing and failed to provide information necessary to determine whether its operations satisfy the Board's jurisdictional standards. Where an employer has completed a commerce questionnaire which does not show sufficient interstate commerce to meet the Board's discretionary standards, and thereafter fails to provide additional commerce information reasonably requested by the Board, invocation of the Tropicana rule is appropriate, Valentine Painting and Wallcovering, Inc., 331 NLRB 883, 884 (2000).

In the absence of the Employer, testimonial evidence from employees was received into evidence at the hearing herein, regarding the jurisdictional issue. That evidence indicates that the Employer has a more than *de minimus* impact upon interstate commerce such that the Board is warranted in asserting jurisdiction over its enterprise. During the past year, approximately 20 customers located outside the State of Indiana paid a minimum of $69 per month for the rental of ice machines. In addition, one customer paid approximately $2,100 for equipment service and repair. This constitutes a total of $18,660 per year in direct inflow. The Employer also purchased two walk-in coolers valued at approximately $10,000 each, and five reach-in coolers at approximately $1,800 a piece, all of which are manufactured out of state, for a total of $29,000 of outflow during the past year. Thus, the Employer's affect upon interstate commerce is greater than *de minimus*, and it will effectuate the purposes of the Act to assert jurisdiction over the Employer.

B. The Single Employer Issue

The term "single employer" applies to situations where separate legal entities operate as an integrated enterprise in such a way that for "all purposes, there is in fact only a single employer." NLRB v. Browning-Ferris Industries, 691 F.2d 1117, 1122 (3rd Cir. 1982). The Board considers four principal factors in determining whether the integration is sufficient to

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[9] The Employer's attendance and records relevant to interstate commerce were also sought by the Petitioner by subpoena.

establish single employer status: the interrelation of operations; centralized control of labor relations; common management; and common ownership or financial control. See Radio Union v. Broadcast Service of Mobile, 380 U.S. 255 (1965) and In re Mercy Hospital of Buffalo, 336 NLRB No. 134 (2001). It is well established that not all of these criteria need to be present to establish single employer status. Single employer status ultimately depends on "all the circumstances of a case." In re Mercy Hospital of Buffalo, *Supra*. The Board has generally held that the most critical factor is centralized control over labor relations. *Id*.

In applying these factors to the present case, it is concluded that Polar Refrigeration and Polar Distributors are a single employer. The evidence indicates that Birkett owns both entities, and that he alone supervises the day-to-day operations of the companies. Birkett assigns the daily work of the three employees at issue here, regardless of whether it is work performed for Polar Refrigeration or Polar Distributors. The employee-witnesses testified that they report hours worked on a clipboard at the shop, and are paid by Polar Refrigeration. There is no evidence that this procedure changes when they perform work for Polar Distributors. The employees work out of the same facility, utilize the same tools, wear the same uniform, and drive the same trucks while performing work for both Polar Refrigeration and Polar Distributors. Since Birkett is the sole manager of the day-to-day operations of both companies, one may also reasonably infer that he establishes the wages, fringe benefits, hours of work and other terms and conditions of the employees' employment. According to the Employers' March 10, 2003 letter to the Region, Polar Distributors was created to comply with requirements of distributorship agreements entered into by the owner. Although Polar Distributors handles a product different than those handled by Refrigeration, testimony indicates that the two companies share some of the same customers. Moreover, a difference in product lines does not negate the existence of single employer status when other determinative criteria are present. Since the two companies are commonly owned and controlled; share common management; are functionally integrated; and share a centralized control of labor relations, it is concluded that Polar Refrigeration and Polar Distributors are a single employer.

C. Labor Organization Status

Section 2(5) of the Act defines a labor organization as:

> … any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

Two characteristics are required for an entity to constitute a labor organization: it must be an organization in which employees participate; and it must exist for the purpose, in whole or in part, of dealing with employers concerning wages, hours, and other terms and conditions of employment. Alto Plastics Mfg. Corp., 136 NLRB 850, 851-852 (1962).

The evidence in the record establishes that the Petitioner is an organization which negotiates and administers collective-bargaining agreements with employers concerning grievances, wages, pay, hours, and other terms and conditions of employment of their

employees. One may reasonable infer, therefore, that the Petitioner's membership is comprised of employees and it is the members who elect its officers. No record evidence controverts the finding that the Petitioner is a labor organization within the meaning of the Act. Based upon the totality of evidence, it is concluded that the Petitioner is a labor organization within the meaning of Section 2(5).

D. The Appropriate Unit

Under Section 9(b) of the Act, the Board has broad discretion to determine "the unit appropriate for the purposes of collective bargaining" in each case "in order to assure to employees the fullest freedom in exercising the rights guaranteed by the Act." NLRB v. Action Automotive, Inc., 469 U.S. 490 , 494-97 (1985). The Board's discretion extends to selecting an appropriate unit from the range of units which may be appropriate in any given factual setting, and it need not choose the most appropriate unit. American Hospital Association v. NLRB, 499 U.S. 606, 610 (1991); P.J. Dick Contracting, Inc., 290 NLRB 150, 151 (1988). In the instant case, the Petitioner seeks an election within a unit consisting of the service technicians and helpers employed by the Employer. This unit currently consists of three employees.

In determining an appropriate unit, the ultimate question is whether the employees share a sufficient community of interest to warrant their joinder within one unit. Alois Box Co, Inc., 326 NLRB 1177 (1998); Washington Palm, Inc., 314 NLRB 1122, 1127 (1994). In determining whether employees share such a community of interest, the Board weighs a variety of factors, including similarities in wages or method of compensation; similar hours of work; similar employment benefits; similar supervision; the degree of similar or dissimilar qualifications, training, and skills; similarities in job functions; the amount of working time spent away from the facility; the integration of work functions; the degree of interchange between employees as well as the degree of employee contact; and the history of bargaining. NLRB v. Action Automotive, Inc., 469 U.S. 490, 494-97 (1985); Kalamazoo Paper Box Corp., 136 NLRB 134, 137 (1962).

In the case at hand, the service technicians and helper perform similar, if not identical work functions under the same supervision. The two service technicians perform the same job duties, which include installing and servicing ice machines, coolers, furnaces and air conditioning units as well as drink machines. Although the technician helper cannot handle freon since he does not possess the requisite training, he performs other functions identical to those of the technicians, such as servicing ice machines and delivering drink machines. He also assists the service technicians in the performance of their duties. The helper works with one of the technicians most of the time. The record establishes that at least one of the service technicians is EPA certified and has one year of schooling in refrigeration, heating, and cooling. The helper is attending school and has attended refrigeration classes. Although the three employees perform many of their functions away from the Employer's facility, they all report to work at the shop in the morning and receive their day's work orders there. They also return to the shop at the end of the workday and at other times perform repairs in the shop. Thus, they have daily work interaction. The technicians and helper work similar hours; earn an hourly wage and receive the same fringe benefits. They also wear the same uniform.

Based upon the foregoing, it is concluded that the service technicians and helpers share a sufficient community of interest to warrant their inclusion within a single unit.

V. DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned, among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the unit who are in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are former unit employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by the Sheet Metal Workers' International Association, Local Union No. 20, a/w Sheet Metal Workers' International Association, AFL-CIO.

VI. NOTICES OF ELECTION

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. An Employer shall be deemed to have received copies of the election notices unless it notifies the Regional office at least five working days prior to 12:01 a.m. of the day of the election that it has not received the notices, Club Demonstration Services, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

VII. LIST OF VOTERS

To insure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of

voters and their addresses which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969). Accordingly, it is directed that 2 copies of an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the undersigned within 7 days from the date of this Decision. North Macon Health Care Facility, 315 NLRB 359 (1994). The undersigned shall make this list available to all parties to the election. In order to be timely filed, such list must be received in Region 25's Office, Room 238, Minton-Capehart Federal Building, 575 North Pennsylvania Street, Indianapolis, Indiana 46204-1577, on or before **April 3, 2002**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

VIII. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099-14th Street. N.W., Washington, DC 20570. This request must be received by the Board in Washington by April 10, 2003.

DATED AT Indianapolis, Indiana, this 27 day of March, 2003.

/s/ Roberto G. Chavarry

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